Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

CHERYL ANN CLARK,

Petitioner,

v.

ELSEY MAXWELL MCLEOD,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the right of a child's sole fit legal parent to decide what is in the best interests of her child upon leaving a relationship with the child's psychological parent. The fit legal parent always properly cared for her child, and never denied reasonable parenting time for the psychological parent. The Colorado Court of Appeals ruled that fitness of the legal parent was immaterial and the psychological parent was entitled to joint decision making for the child. The following questions are presented:

1. Does a court violate the Fourteenth Amendment Substantive Due Process rights of a fit legal parent when it gives equal decision making and nearly equal parenting time with the fit legal parent's child to a psychological parent over the objections of the fit legal parent?

2. Did the Colorado Court of Appeals err in holding, in conflict with the courts in ten states and the United States Court of Appeals for the Eleventh Circuit, that the decision of the fit legal parent to involve a psychological parent in raising the child, and resulting emotional bond between the psychological parent and child, was a "special factor" that deprived the fit legal parent of the presumption that she makes decisions that are in the best interest of her child as required by *Troxel v. Granville*, 530 U.S. 57 (2000)?

3. Does a conclusive presumption of emotional harm to the child resulting solely from a reduction in a psychological parent's parental responsibilities rebut the *Troxel* presumption in favor of a fit legal parent and constitute a compelling state interest justifying the court's overriding of a fit legal parent's right to make decisions for her child?

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Colorado State Courts are listed in the caption of the Petition.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the decision of the Colorado Court of Appeals, which held that the Respondent was a psychological parent entitled to equal decision making and nearly equal parenting time with the Petitioner's child. The court ruled that because the Petitioner voluntarily involved the Respondent in the life of her child and allowed her to become a psychological parent, and because emotional harm to the child was conclusively presumed from any reduction in parenting time or decision making for the psychological parent, the presumption accorded to the Petitioner as the sole fit legal parent for her daughter under *Troxel v. Granville*, 530 U.S. 57 (2000) should be disregarded and the Court of Appeals was required to intervene and grant parental responsibilities in the best interest of the child.

OPINIONS BELOW

The unpublished order of the Colorado Supreme Court denying the Petition for Writ of Certiorari, dated October 25, 2004, appears as Appendix A. The decision of the Colorado Court of Appeals, dated July 1, 2004, appears in Appendix B hereto and is reported as *E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004). The unpublished *Permanent Orders* of the Denver District Court, dated April 28, 2003, appears at Appendix D. The unreported *Order* of the Denver District Court dated March 29, 2004, dealing with the release of transcripts for use in the impeachment proceedings filed by multiple members of the Colorado House of Representatives against the trial judge because of his decision in this case appears at Appendix C.[1] The unreported Denver District Court decision dated November 9, 2001, upholding the

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[1] Neither Petitioner nor her counsel had involvement in the impeachment proceedings.

Magistrate's order of July 10, 2001, appears as Appendix E. The unreported Magistrate's order of July 10, 2001, holding the joint custody order of March 26, 1996, void and ruling that *Troxel* does not apply to these proceedings appears as Appendix F. The unreported Magistrate's Order of June 5, 2001, setting a three day rotation for the parenting time schedule for Petitioner's child, appears as Appendix G. The unreported Order granting joint custody dated March 25, 1996, appears as Appendix H.

STATEMENT OF JURISDICTION

The Denver District Court is a court of general jurisdiction in the State of Colorado pursuant to Article VI, § 9 of the Colorado Constitution. It exercises jurisdiction over family law matters. The District Court's permanent orders, allocating parental responsibilities, and giving the Respondent equal decision making for Petitioner's child in all areas, except religion and dental care, and nearly equal parenting time was entered on April 28, 2003. Petitioner filed a timely notice of appeal on June 11, 2004. The Court of Appeals entered its decision on July 1, 2004. Petitioner timely filed a Petition for Writ of Certiorari with the Colorado Supreme Court on August 11, 2004. The Colorado Supreme Court entered its Order denying the Petition for Writ of Certiorari on October 25, 2004. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent initiated the action that results in this Petition by filing a Verified Motion for Allocation of Parental Responsibilities with regard to Petitioner's child, seeking equal parenting time[2] with the Petitioner.

A. Facts.

The Trial Court found that Cheryl Clark and Elsey McLeod lived in a committed relationship for eleven years before this action commenced. They owned a home in joint tenancy. They had a commitment ceremony, and discussed having a child by various means, including in vitro fertilization or by adoption. App. 8a. Cheryl Clark is a psychiatrist and Elsey McLeod is a psychologist. App. 245a, 254a. Dr. Clark decided to adopt a child from China. Dr. McLeod did not want to adopt a child of her own, but supported Dr. Clark's adoption efforts. Dr. Clark alone filled out the adoption paperwork and was approved for the adoption of a child from China. App. 258a, 356a.The parties both traveled to China for Dr. Clark's adoption of Dr. Clark's daughter. App. 257a. Dr. Clark was the sole adopting parent in a Chinese adoption. App.258a-259a. Upon returning to the United States, Dr. Clark domesticated her adoption in the Denver District Court. App. 259a.

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[2] In Colorado, "parenting time" refers to the amount of time that a person spends with a child, and is akin to "visitation" in other States. "Parental responsibilities" is akin to "custody" in other States and includes "parenting time" and "decision-making responsibilities". *See In re Marriage of Roosa*, 89 P.3d 524, 527 (Colo. App. 2004).

Subsequent to this, Dr. Clark applied for a change of name for her child and "McLeod" was added as her child's additional middle name. Dr. Clark testified that this was for the purpose of acknowledging someone who had been important in the child's life. App. 266a-267a, 358a.

The parties filed a joint "Petition for Custody" with Dr. Clark as a parent and Dr. McLeod as a non-parent in 1996. App. 9a. The stipulated custody decree was approved by the Denver District Court. App. 90a-91a.

Dr. Clark and Dr. McLeod jointly raised Dr. Clark's child, however the parties presented conflicting evidence regarding what percentage of time each spent with the child. App. 10a, 54a-55a, 259a. Dr. Clark contended that she maintained sole decision making even though Dr. McLeod was helping to raise the child. App. 261a.

The relationship between the parties ended. Dr. Clark left the lesbian lifestyle completely and returned to the Christian faith of her youth. App. 357a, 359a-360a. A dispute arose over how much time Dr. McLeod should spend with Dr. Clark's child. Dr. Clark proposed every other weekend on Thursday night to Monday morning, with a Wednesday visitation on the alternate weeks. App. 235a. Dr. McLeod insisted upon having equal parental responsibilities for the child. App. 229a.

B. Proceedings Below.

The parties had commenced the custody proceeding in the Denver District Court in 1996. In 2001, Dr. McLeod filed her Verified Motion for Establishment of the Parenting Time Schedule. App. 227a-230a. Dr. Clark responded with a Verified Response to the Verified Motion in which she set forth her offer of parenting time and raised her Fourteenth Amendment right to parent her child as she saw fit. App. 232a-236a. Dr. McLeod contended that she was entitled to an

exact 50/50 split of parental responsibilities. App. 247a, 249a-250a.

1. The Denver District Court

After the Verified Motion and Response was filed, the Magistrate, without hearing, entered temporary orders dated June 5, 2001. Pursuant to these temporary orders, the adults vacated their joint residence on a three day rotation so that the child would spend three days with Dr. Clark and three days with Dr. McLeod, etc., at the parties' residence. Subsequently, when Dr. McLeod moved, the child was required to go between the residences every three days. App. 86a. The Magistrate ordered the parties to brief two issues, (1) the validity of the joint custody decree, and (2) the applicability of this Court's ruling in *Troxel*. App. 88a. Dr. Clark raised *Troxel* and her Fourteenth Amendment parental rights in her *Trial Brief: 1) Validity of Joint Custody Order 2) Implication of Troxel v. Granville*. App. 102a-108a, 120a.

On July 10, 2001, the Magistrate ruled that the joint custody decree was void *ab initio* for lack of a case or controversy. The Magistrate also ruled that *Troxel* would not be applicable to the determination of parental rights, but that the issues would be decided solely on the basis of the best interests of the child. App. 83a-84a.

Dr. Clark timely appealed the Magistrate's *Troxel* decision to the district judge and again raised her *Troxel* rights and Fourteenth Amendment rights in her *Trial Brief: Troxel v. Granville*. App. 124a-130a, 140a. The district judge entered an order dated November 9, 2001, upholding the Magistrate's ruling. App. 73a. Dr. Clark also raised the Constitutional issues in her *Amendment to Verified Response*. App. 238a-240a.

In preparation for the permanent orders hearing, Dr. Clark again raised the *Troxel* and Fourteenth Amendment

issues in her T*rial Brief-Permanent Orders Hearing*. App. 150a-162a, 165a-169a.

At the trial, the parties presented competing experts and competing parenting plans with respect to parental responsibilities for Dr. Clark's child. Dr. Clark proposed a plan with decreasing parenting time for Dr. McLeod. App. 271a, 298a-299a. The court-ordered parenting time would end in 2005. The parties would then decide upon a reasonable parenting time schedule. App. 299a. Dr. Clark further proposed that as the sole legal parent of the child she alone would have decision-making responsibilities for her daughter. App. 306a.

Dr. McLeod insisted upon an exact 50/50 split of parental responsibilities. App. 250a, 311a. This is in spite of the fact that in a letter to her court expert, Dr. Katz, Dr. McLeod stated that such an exactly equal sharing of parental responsibilities was "pathological." App. 253a, 311a. Dr. McLeod further testified that she did not know whether a reduction in parenting time to a 55/45 plan was harmful to the child and she did not know whether a 60/40 parenting time plan (with Dr. Clark having 60% and Dr. McLeod having 40%) was detrimental to the child. App. 247a. Dr. Katz testified that he did not recommend or advocate 50/50 parenting plans. App. 285a.

Dr. Clark testified that her plan was in her child's best interests and gave a detailed and reasoned explanation as to how she arrived at that conclusion. App. 270a-272a. Her expert, Dr. Throckmorton, testified that the plan proposed by Dr. McLeod was an accident waiting to happen. App. 332a.[3]

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[3] The trial judge failed to record the last three quarters of the second day of testimony in the case. This was the portion of the permanent orders hearing during which most of Dr. Clark's evidence was put before the Court, including Dr. Throckmorton's testimony. When the time came to

The record is devoid of any evidence, testimonial or written, that Dr. Clark's parenting plan would cause any harm to the child, let alone serious emotional injury.

The *Troxel* presumption and Dr. Clark's Fourteenth Amendment rights were again raised by counsel in closing argument. App. 344a, 350a-351a.

The trial court found that Dr. McLeod had been heavily involved in raising Dr. Clark's daughter and had formed an emotional bound with the daughter, but stopped short of calling Dr. McLeod a psychological parent. App. 55a. The court ruled that because of the emotional harm that would be caused by any reduction in parental responsibilities, it would approve nearly equal parenting time and joint decision making, except for religion and dental care, for which Dr. Clark would have sole decision making. App. 63a, 65a.

2. The Colorado Court of Appeals.

A timely Notice of Appeal was filed. Dr. Clark raised the federal constitutional issues, and the *Troxel* presumption, in her opening brief. App. 173a-174a, 180a, 199a-205a.

The Court ruled that based upon the factual findings, Dr. McLeod was a psychological parent to the child and further that Dr. McLeod did not have to show that Dr. Clark was unfit as a parent before it would interfere with Dr. Clark's parental rights. App. 24a. The Court recognized that Dr. McLeod did not have the same constitutional parental rights as Dr. Clark did in her capacity as the child's sole fit legal parent. App. 38a. The Court then ruled that in order to

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prepare the record for appeal, and the parties discovered what the trial court had done, they invoked C.A.R. 10(c) which allows for the reconstruction of testimony when a record is not kept. Hence Dr. Clark filed motions to approve the reconstructed testimony of Dr. Throckmorton which was approved. (App. U. & V.), and to approve her counsel's reconstructed closing argument, which was also approved (App. X & Y.).

infringe upon Dr. Clark's constitutional rights, it had to find a compelling state interest. The Court found this compelling state interest by presuming that emotional harm to a child was intrinsic when there is any reduction in parental responsibilities or parenting time for a psychological parent. App. 37a, last ¶. Having thus found a compelling state interest, the Court ruled that this interest was a "special factor" sufficient to overcome Dr. Clark's *Troxel* presumption, especially where Dr. Clark had facilitated the psychological parent relationship. App. 40a.

3. The Colorado Supreme Court

Dr. Clark timely filed a Petition for Writ of Certiorari. App. 211a. In her Petition she again raised her right to a *Troxel* presumption and the Fourteenth Amendment issues that are before the Court on this Petition. App. 215a, 221a-225a. The Colorado Supreme Court denied certiorari; Justice Coats would have granted certiorari on the federal constitutional issues. App. 2a.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Resolve a Conflict Among the Various States' Appellate Courts Regarding the Rights of a Child's Fit Legal Parent to Limit a Psychological Parent's Involvement with the Child.

A split exists among the States regarding a fit legal parent's fundamental Fourteenth Amendment Substantive Due Process right to make decisions concerning the care, custody, and control of her child in a psychological-parent situation. At least ten, and possibly as many as twelve, of the fifty States respect the Fourteenth Amendment rights of a fit legal parent in such a situation and defer to the parenting decisions made by the fit legal parent. Eleven States, now including Colorado, and possibly as many as twelve, disregard the Fourteenth Amendment rights of a fit legal parent, holding that the fitness of the legal parent in a psychological-parent

situation is immaterial, and defer to a best-interest-of-the-child test in order to protect perceived emotional ties between the child and psychological parent.

A. The Decision of the Colorado Courts Regarding the Legal Parent's Right to Raise Her Child Without Court Interference is in Direct Conflict with Decisions in Ten States and the United States Court of Appeals for the Eleventh Circuit.

Courts in California, Florida, Georgia, Iowa, Ohio, New Hampshire, New York, North Carolina, Tennessee, and Vermont, unlike the Colorado Court of Appeals, have held that the fact that a third party has strong emotional bonds with the legal parent's child and has helped to raise the child (i.e., has become a psychological parent to the child) does not give the third party any right to have a court award parenting time with or decision making for the child over the objection of the fit legal parent.[4]

In California, the courts have held that, in the absence of a finding of harm to the child by placing the child with her legal parents, a de facto or psychological parent would not be entitled to custody. *Guardianship of Z.C.W. and K.G.W.*, 84 Cal.Rptr.2d 48, 50 (Cal. App. 1999), *cert. denied*, *Crandall v. Wagner*, 528 U.S. 1056 (1999); *Nancy S. v. Michele G.*, 279 Cal.Rptr. 212, 216 (Cal. App.1991) ("It does not, however, follow that as a 'de facto' parent appellant has the same rights as a parent to seek custody and visitation over the objection of the children's natural mother.").

In a 1999 Florida case, a same-sex psychological parent contended that she had parental status equal to that of the

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[4] The various States refer to persons who have helped raised another's child and formed an emotional bond to the child by various names, including "psychological parent," "equitable parent," "de facto parent," "in loco parentis," or "parent by estoppel".

biological mother of the children. In resolving the issue, the Florida Court of Appeals noted that the Florida Supreme Court, in the case of *Von Eiff v. Azicri*, 720 So.2d 510, 514-15 (Fla. 1998), "citing the fundamental and constitutional right of privacy, has reaffirmed adoptive or biological parents' right to make decisions for their children's welfare without interference by third parties." *Kazmierazak v. Query*, 736 So.2d 106, 109 (Fla. App. 1999), *review denied*, 760 So.2d 947 (Fla. 2000). Thus, in Florida a psychological parent is not entitled to parental status equivalent to the biological parent, and can not seek custody or visitation of the biological parent's child against her wishes. *Id.* at 110.

In Georgia, when a biological parent seeks to obtain custody of his children from third-party relatives who have been responsible for the daily care of his children, the third-party relatives may prevail only if they show that a return of the child to the parent would harm the child. *Clark v. Wade*, 544 S.E.2d 99, 107 (Ga. 2001) ("By harm, we mean either physical harm or significant, long-term emotional harm; we do not mean merely social or economic disadvantages.").[5]

In *Petition of Ash*, 507 N.W.2d 400 (Iowa 1993), the district court had determined that Ash was the "equitable parent" of a child born to Andrea Kotecki. *Id.* at 401. Although Ash was not the child's biological parent and was not married to the child's mother, the trial judge made this determination based on the best interests of the child. *Id.* The Iowa Supreme Court held that there was "no statutory or common law basis" for Ash's paternity claim. *Id.* at 404.

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[5] However, the Georgia Supreme Court held, based on *In re Custody of C.C.R.S.*, 892 P.246, 254-255 (Colo. 1995), that, "When parental rights are not severed, federal constitutional law does not require a showing that the parent is unfit before custody may be awarded to a third party." *Clark v. Wade*, *supra*, at 105.

In *Matter of Nelson*, 825 A.2d 501 (N.H. 2003), the petitioner claimed that the status of parent should be extended to cover all persons who have established a parental relationship with a child through the *in loco parentis* or psychological parent doctrines, affording them the same constitutional protections. *Id.* at 503. The New Hampshire Supreme Court stated that under the New Hampshire Constitution "we have long recognized the right to raise and care for one's children is a fundamental liberty interest . . . and have extended such protection to both natural and adoptive parents." *Id.* at 502 (citations omitted). "Similarly, the United States Supreme Court precedent recognizes 'that the Due Process Clause of the Fourteenth Amendment [to the Federal Constitution] protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' *Troxel v. Granville*, 530 U.S. 57, 66 (2000). . . (plurality opinion)." *Id.* at 503. The Court held that to grant an unrelated third person with *in loco parentis* or psychological parent status the same constitutionally protected rights to custody as a fit natural or adoptive parent would elevate the rights of any unrelated third person who has spent considerable time caring for a child over the fundamental liberty interests of fit natural or adoptive parents, and declined to do so. *Id.* at 504.[6]

The New York Court of Appeals was faced with a situation wherein the petitioner, a woman who was a biological stranger to a child who was properly in the custody of his biological mother, claimed to be a parent of the child because of her close and loving relationship and the promise

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[6] The case was ultimately decided under the New Hampshire Constitution, but based upon the court's reliance on *Troxel*, the New Hampshire Supreme Court would not have reached this ultimate decision if it conflicted with its interpretation of the Fourteenth Amendment.

of the biological mother to support her standing before the court. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991). The Petitioner claimed she was a de facto parent or a parent by estoppel. *Id.* at 29. The New York Court of Appeals, in denying the biological stranger's petition for visitation, held that "to allow the courts to award visitation – a limited form of custody – to a third person would necessarily impair the parents' right to custody and control," and therefore the third party "has no right to petition the court to displace the choice made by a fit parent in deciding what is in the child's best interests." *Id.* at 29.

North Carolina does not allow a psychological parent to overcome the constitutional rights of a fit legal parent to raise her child. In *Brewer v. Brewer*, 533 S.E.2d 541, 546-47 (N.C. Ct. App. 2000), decided less than two months after *Troxel*, the court noted that in the case of *Peterson v. Rogers*, 445 S.E.2d 901, 905 (N.C. 1994), the North Carolina Supreme Court had held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail" in a dispute with a non-parent, based on a presumption that a fit parent will act in the best interests of his or her child. Citing *Troxel*, the North Carolina Court of Appeals ruled that "absent a finding of unfitness or neglect by the natural parent, a best interests of the child test would violate the parent's constitutional rights." *Brewer, supra*, at 548.

In Ohio, even though the legal parent may consent to co-parenting by a third party, and even though the third party may be able to claim psychological or "second parent" status, the third party does not thereby obtain parental rights. *In re Bonfield*, 773 N.E.2d 507, 513 (Ohio 2002). In a child custody proceeding between a parent and non-parent, custody may not be awarded to the non-parent absent a finding that the

parent is "unsuitable" to be a parent. *In re Jones*, 2002 WL 940195 *4 (Ohio App. 2002).[7] This is true even though the third party may be a de facto parent under the doctrine of *in loco parentis*. *Id.* at *6 & *7.

In Tennessee, it was held that a mother's former partners in homosexual relationships had no constitutional right to visitation, despite their alleged status as de facto parents who loved, cared for, and supported the mother's children. *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. App. 1999), *cert. denied*, Jan. 24, 2000.[8]

The Supreme Court of Vermont could find "no legal basis" for a de facto parent to interfere with the rights and responsibilities of a fit legal parent. *Titchenal v. Dexter*, 693 A.2d 682, 685 (Vt. 1997). Likewise, the Supreme Court of Vermont refused to find that public-policy considerations compelled it to intervene to give third parties claiming a parent-child like relationship contact with the children of fit parents. *Id.* at 687. The Supreme Court of Vermont specifically noted the dangers of forcing parents to defend third-party visitation cases, including the courts having to possibly divide the children's time among several parties. *Id.*

In at least ten, and probably twelve, of the fifty States fit legal parents have a right under the Fourteenth Amendment to the custody, care, and control of their children, that can not be taken from them simply because there is a psychological parent with emotional ties to the child that claims a right to

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[7] Pursuant to Ohio Rep. R. 4(C), all Ohio Court of Appeals issued after May 1, 2002, whether or not reported, may be cited as legal authority.

[8] The court also recognized a split in the states regarding this issue. *In re Thompson, supra,* at 920.

parenting time or parental responsibilities.[9] The Colorado Court of Appeals' ruling that, in spite of *Troxel*, the fitness of the legal parent is immaterial is in direct conflict with these courts. *E.L.M.C.* at 557. The emotional tie between the psychological parent and the child is not sufficient to override the decisions of the fit legal parent concerning the child. In accord with this view is the case of *Lofton v. Secretary of the Dep't of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, ___ U.S. ___ (Jan. 10, 2005). *Lofton* involved a challenge by homosexual guardians and foster parents, claiming to have "psychological families" and to be "psychological parents" to their foster children, to the constitutionality of Florida's law prohibiting homosexuals from adopting children. "Emotional ties [with the children], regardless how strong and intense, do not by themselves create the constitutional right" to maintain a relationship with a child. *Lofton*, at 812, n.9. If emotional ties with children are insufficient to create a constitutionally protected right for "psychological parents," to maintain a relationship with children entrusted to them, then there can be no constitutionally permissible basis for overriding the decision of fit legal parent who does have constitutional rights to make decisions regarding their children simply to preserve a presumed emotional relationship between a third party and the

[9] In Alaska, "even in custody disputes between parents and stepparents, the best interests standard is rejected in favor of the . . . parental preference." *Kinard v. Kinnard*, 43 P.3d 150, 154 (Alaska 2002). The Alaska Supreme Court found *Troxel* to be inapplicable because *Troxel* did not involve a psychological parent. *Id.* at 155. In Kansas, although the ruling was not issued in a psychological parent context, a court may not use the doctrines of unclean hands or estoppel to circumvent the *Troxel* presumption and must give weight to the legal parent's fitness. *State Dep't of Social & Rehabilitation Services v. Paillet*, 16 P.3d 962, 965, 969-70 (Kan. 2001).

child. The Colorado Court of Appeals erred when it did just that.

B. Courts in Eleven States Allow the Emotional Bonds Between a Psychological Parent and Child to Overcome the Constitutional Rights of the Child's Fit Legal Parent.

A growing number of States hold that granting parental responsibilities or parenting time to a psychological parent over the objection of the child's fit legal parent does not violate the Fourteenth Amendment. These States circumvent the presumption required by *Troxel* using a variety of innovative theories designed to give heightened protection to the emotional relationship of a third party with another's child, as shown below in this section.

Colorado first recognized the concept of psychological parent in the case of *In re C.C.R.S.*, 892 P.2d 246 (Colo. 1995). The Colorado Supreme Court held that although there is a presumption that the biological parent has a first and prior right to custody in a custody dispute with a non-parent, the "presumption may be rebutted by evidence establishing that the welfare of the child – i.e., the best interests of the child – is better served by granting custody to a non-parent." *Id.* at 256. "Non-parent, as used in this analysis, may include friends, relatives, grandparents, step-parents or child-care agencies, or, in other words, any person or agency other than the child's natural parent." *Id.* at 256, n.23; *see also, E.L.M.C , supra*, at 554 ("Thus by its plain terms, [C.R.S. § 14-10-123(1)(c)] establishes that *any* nonparent may commence parental responsibility proceedings so long as the nonparent had physical care of the child for at least six months.")(emphasis in original). Thus, if a court concludes that any person or agency would be a better parent than the child's fit legal parent, the fit legal parent's Fourteenth Amendment rights are ignored and the legal parent loses

control of her child. In *C.C.R.S.*, the Court held that "the continuation of this relationship [with the psychological parents] can therefore be presumed to be in the child's best interests." *Id.* at 258. This is exactly what the Colorado Court of Appeals did to Dr. Clark, in spite of her parental rights protected by the Fourteenth Amendment and *Troxel*.

At least nine other States have also taken this approach to depriving a fit legal parent of her Fourteenth Amendment right to determine who can visit with her child. But none have gone so far as the Colorado Court of Appeals did in taking away decision making.

In Arizona, "a person standing in loco parentis to a child is not a 'parent,' does not enjoy parental rights, and therefore does not become an 'additional parent'." *Riepe v. Riepe*, 91 P.3d 312, 317 (Ariz. Ct. App. 2004). However, notwithstanding this seeming respect for the rights of the fit legal parent, the Arizona courts, pursuant to statute, allow one standing in loco parentis to a child to obtain visitation with the child over the objections of the child's fit legal parent, even though the fit legal parent may still be caring for her child. *Id.* at 318.[10]

In Indiana, "when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners by donor semen, both women are the legal parents of the resulting child." *In re the Parentage of A.B.*, 818 N.E.2d 126, 131-32 (Ind. Ct. App. 2004). The biological mother relied on *Troxel*. In

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[10] The dissent, relying on *Troxel*, found serious constitutional problems with this approach. *Riepe, supra*, at 338-39. ("This is another consideration that strongly weighs in favor of utilizing a definition of 'parent' with gender and number limitations and construing the statute to provide for those who take the place of parents rather than those who act in addition to or in support of parents.")

response to that argument, the court held that because it had determined that the partner was also a legal parent to the child, the two women stood on equal footing and there was no violation of the Fourteenth Amendment when it gave the partner equal rights to the child. *Id.* at 132.

Maine recognizes the presumption that fit parents act in the best interests of their children and that trial courts must accord special weight to parents' decisions and objections regarding requests for visitation. *Rideout v. Riendeau*, 761 A.2d 291, 297 (Me. 2000). Further, "because a fundamental liberty interest is interfered with by the State [when a court attempts to override the decision of a fit legal parent], the State is required to demonstrate that its actions serve a compelling state interest." *Id.* at 300. "The best interest of the child standing by itself is not a compelling state interest." *Id.* at 294. Having said all this, the Court then held that "urgent reasons" exist where the grandparents had functioned as parents to the child and are seeking continual contact with the child. *Id.* at 301. This relationship then "warrants application of the court's *parens patriae* authority on behalf of the child and provides a compelling basis for the State's intervention into an intact family with fit parents." *Id.* at 302.

In Maryland, when the former same-sex partner of the child's mother sought visitation with the child over the mother's objection, the court ruled that because she had the status of de facto parent, there was no presumption that the same-sex partner was not entitled to visitation. *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000). At most the biological mother has a presumption only with regard to custody and scheduling visitation. *Id.*

In Massachusetts, the courts recognize a parent's Fourteenth Amendment liberty interest, but balance the parent's right in protecting her custody of her child with the child's interest in maintaining her relationship with the child's

de facto parent. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 (Mass. 1999), *cert. denied*, 528 U.S. 1005 (1999).

In New Jersey, "once a third party has been determined to be a psychological parent to a child . . . he or she stands in parity with the legal parent" and, "custody and visitation issues between them are to be determined on a best interests standard." *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000); *see also, P.B. v. T.H.*, 851 A.2d 780, 786 (N.J. Super. Ct. App. Div. 2004). However, even though a psychological parent stands in parity with the legal parent, the legal parent's status is given significant weight and "when the evidence regarding the child's best interest (as between a legal parent and a psychological parent) is in equipoise, custody will be awarded to the legal parent." *V.C. v. M.J.B.*, *supra*, at 554.

In Pennsylvania, "the rights and liabilities arising out of an *in loco parentis* relationship are . . . exactly the same as between parent and child." *T.B. v. L.R.M.*, 786 A.2d 913, 917 (Pa. 2001). Therefore, the *Troxel* presumption is not applicable. *Id.* at 919.

In Rhode Island, a de facto parent can establish an entitlement to parental rights, notwithstanding the *Troxel* presumption. *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000). The biological parent can not arbitrarily terminate the child's relationship with his de facto parent. *Id.*

In Washington, a psychological parent may maintain a relationship with the child over the objections of the fit legal parent where severing the relationship would be "detrimental to the child," in spite of the *Troxel* presumption. *Parentage of L.B.*, 89 P.3d 271, 286 (Wash. Ct. App. 2004), *review granted*, 101 P.3d 107 (Wash. 2004).

While all of these cases have granted rights to the psychological parent over the objection of the legal parent, none have gone as far as the Colorado Court of Appeals in

trampling the Fourteenth Amendment's Due Process rights of fit legal parents. All of the cases cited above in this section involved the legal parent attempting to sever all contact with the psychological or de facto parent.[11] Dr. Clark never sought to sever all contact with Dr. McLeod, but rather to merely reduce it to a manageable level. If Dr. Clark was a fit parent, then she is entitled to the presumption that her decision to reduce time with the psychological parent is in the child's best interest. The Colorado Court of Appeals recognized Dr. Clark's *Troxel* rights, but then found a conclusive presumption of harm always occurring anytime there is any reduction in parenting time or decision making for the psychological parent. *E.L.M.C.* at 560. The Colorado Court of Appeals then reasoned that prevention of such presumed emotional harm, of which there is no evidence of its existence or severity in the record, was a compelling state interest justifying the courts' interference with Dr. Clark's decision making for her child. *Id.* at 562. The Colorado Court of Appeals found that any emotional harm to the child is a special factor under *Troxel* that overcomes the presumption that a fit legal parent makes decisions that are in her child's best interests. *Id.* The exception to the rule set forth in *Troxel* thus swallows the rule.

C. This Court Should Grant Certiorari to Resolve the Conflict and Confusion in the Respective States.

The psychological-parent problem arises not only in same-sex parenting cases, but in cases involving live-in boy

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[11] Wisconsin requires the psychological parent to prove a parent-like relationship with the child and a "significant triggering event," that being that the child's parent has "interfered substantially" with the relationship, such as by cutting off all contact with the child. *Custody of H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995), *cert. denied, Knott v. Holtzman*, 516 U.S. 975 (1995).

friends, relatives, or friends who have been asked to care for a person's child for an extended period of time. The fundamental right of fit legal parents to make decisions concerning the care, custody, and control of their children should not depend on what State the parent finds himself or herself in, as is now the case. If the Fourteenth Amendment right set forth in *Troxel* is to have any meaning at all, a fit legal parent who has involved a third party in his or her child's life, whether or not that third party achieves the status of psychological parent, must be able to reduce the involvement of the third party without court interference. The courts in at least ten, and possibly twelve, states say this is the case. Courts in eleven other states say it is not. This Court should resolve the conflict in the interests of protecting the constitutionally guaranteed rights of fit legal parents.

II. Certiorari Should be Granted to Correct the Colorado Courts' Dramatic Departure from The Supreme Court's Parental Rights Jurisprudence as Set Forth in *Troxel*.

A. The Decision of the Colorado Court of Appeals is Contrary to This Court's Long Established Precedent Protecting the Rights of Legal Parents to Make Decisions Concerning the Care, Custody, and Control of Their Children.

The United States Supreme Court has long recognized the right of a fit legal parent to direct the upbringing of her child. There are certain liberties guaranteed by the Fourteenth Amendment to the United States Constitution. "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness

by free men." *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923). A fit parent's Fourteenth Amendment rights include "the liberty of parents . . . to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). "The child is not the mere creature of the state . . . ." *Id.* at 535. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944).

This Court has also recognized the fundamental right of fit parents to make decisions concerning the care, custody, and control of their children, and that the parent-child relationship is a higher priority than any other party's relationship to the child. "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). The State's interest in caring for the child of a natural or adoptive parent is *de minimis* if that parent is shown to be a fit parent. *Id.* at 657-58. This Court has recognized that:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); *see also, Quilloin v. Walcott,* 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

The importance placed upon the relationship between the child and a fit legal parent has been emphasized by the higher standard of proof required before the State can substantially interfere with the parent's constitutional rights. *See, Santosky II v. Kramer*, 455 U.S. 745, 766-67 (1982) (a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing). The Due Process Clause of the Fourteenth Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests, including the right to have children and to direct the education and upbringing of one's children. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

Dr. Clark's Fourteenth Amendment right to the care, custody and control of her own child includes making decisions as to who her daughter spends time with. As Justice Souter observed in his concurring opinion in *Troxel*:

> The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. *Pierce, supra,* at 535, 45 S.Ct. 571 . . . It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general

> population merely because the judge might think himself more enlightened than the child's parent.

Troxel, supra, at 78-79. Dr. Clark was a fit parent and made a decision to include Dr. McLeod in the life of Dr. Clark's child, and if Dr. Clark was fit when she decided to reduce Dr. McLeod's involvement, then the courts should not have intervened with Dr. Clark's parenting.

The prior relationship between Dr. Clark and Dr. McLeod is the type of "shifting economic arrangement" that is not entitled to the constitutional protection that the Supreme Court of the United States has consistently granted to the relationship between a fit legal parent and child.

In declining to order the trial court to adopt Dr. Clark's parenting plan for her child, without any finding of unfitness or total exclusion of the psychological parent from the child's life, the Colorado Court of Appeals failed to protect Dr. Clark's fundamental constitutional rights as a fit legal parent. The State has impermissibly interfered with Dr. Clark's fundamental rights with no evidence (whether clear and convincing, or otherwise) that there was any valid compelling state interest to so interfere. The Colorado Court of Appeals thus violated Dr. Clark's Fourteenth Amendment rights and failed to uphold the constitutional protection of the parent-child relationship.

B. The Decision of the Colorado Court of Appeals is Contrary to This Court's Ruling in *Troxel.*

By ruling that merely encouraging or allowing one's child to become emotionally bonded to a non-parent is a special circumstance such as to require the court to set aside the fit legal parent's Fourteenth Amendment right to make decisions for her child when the fit legal parent is properly caring for her child and allowing contact with the non-parent, the Colorado Court of Appeals decided this case and established a precedent which is contrary to the law as set forth by the

United States Supreme Court in *Troxel*. In effect, given the lack of any evidence of harm, the Colorado Court of Appeals has said that any reduction in decision-making by a non-parent automatically threatens emotional harm to the child, and this mere threat of emotional harm is sufficient to overcome the presumption under the Fourteenth Amendment that a fit legal parent acts in the best interest of her child. Of course, the Respondent's alleged prior equal right to make decisions regarding religion and dental care was taken from her, thus effectively under-cutting the rationale of the Colorado Court of Appeals, and revealing that this is in fact a case of judges simply believing they can make a better decision than the child's sole fit legal parent. This is a dangerous precedent for all parents that requires the intervention of the United States Supreme Court.

This Court stated that, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, *supra*, at 68-69. Here, there is no reason for the State to inject itself into Dr. Clark's life and dictate how she must raise her child. As in *Troxel,* no one in this case has alleged that Dr. Clark is an unfit parent. Dr. Clark is the only legal parent of the child.[12] Dr. McLeod does not have this status. *E.L.M.C.*, *supra*, at 561. Dr. McLeod could have adopted a child of her own had she wished to be a mother to a child. Having failed to do so, she now cannot simply usurp the parental rights of Dr. Clark and obtain a child by taking one from her mother.

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[12] She is an adoptive parent and pursuant to C.R.S. §19-5-211(1) has all of the rights and responsibilities of a natural parent.

In *Troxel,* the Court observed that the fit, legal parent did not seek to cut off visitation by the grandparents entirely. *Troxel*, *supra*, at 71. Here, too, Dr. Clark has not sought to deprive Dr. McLeod of parenting time altogether. In fact, Dr. Clark proposed a "traditional parenting time plan."[13] Dr. Clark's plan is reasonable. The trial court simply substituted its own judgment and plan.

"[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel, supra,* at 72-73. However, that is precisely what the state judge did in this case. In *Troxel* the case involved nothing more than a simple disagreement between the Washington trial court and the mother regarding her children's best interests. *Id.* at 72. As such, this Court found that the trial court should have deferred to the decision of the fit legal parent. So too, this case is nothing more than a disagreement between the trial court judge and Dr. Clark as to how much parental responsibility Dr. Clark should give up. The Colorado courts should have deferred to Dr. Clark's parenting plan.

The Court of Appeals recognized that *Troxel* is binding precedent, but ruled, "that this threatened [emotional] harm both rebutted the *Troxel* presumption in favor of Clark and constituted a compelling state interest justifying court modification of her parenting plan." *E.L.M.C.*, *supra*, at 562. The Trial Court also recognized that *Troxel* is binding

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[13] Dr. Clark's plan proposes that Dr. McLeod spend decreasing time with her daughter. Dr. Clark's plan is based, in part, on the case of *In re Parental Responsibilities Concerning K.L.M.D.*, Adams Co. Dist. Ct. Case No. 99DR1644, affirmed by 2002 WL 31126798. App. 271a, 295a.

precedent,[14] yet ruled "[T]his Court, however, is free to determine 'special factors', override Dr. Clark's position and to determine by clear and convincing evidence that any presumption due Dr. Clark's position is outweighed in determining the best interest of the minor child." App. 60a. The trial court cited no authority for this conclusion. However, it can be assumed it was referring to the observation in *Troxel* that the trial court's order in *Troxel* granting visitation to third parties "was based on precisely the type of mere disagreement we have just described and nothing more. The [trial court's] order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters." *Troxel*, *supra*, at 68. This Court did not explain what it meant by the phrase "special factors" but it immediately turned to a discussion of parental fitness, stating, "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel, supra,* at 68-69, citing *Reno v. Flores*, 507 U.S. 292, 304 (1993). The correct meaning of this language is that without the "special factors" of unfit parents or immediate physical harm to the child, a court must defer to the fit legal parent's decisions.

In this case, the trial court's order goes against the clear language of *Troxel* that the court is not to substitute its own judgment for that of the fit legal parent. None of the benign "special factors" cited by the Colorado Courts address any sort of harm to the child, or unfitness of the parent.

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[14] "The language of *Troxel* is very interesting, and binding on this Court." App. 59a.

The trial court listed six factors in support of its disregard of Dr. Clark's fundamental rights. App. 60a-61a. Those factors were that: Dr. Clark entered the joint petition for custody (which was declared void and which was *expressly* not relied upon by the trial court); Dr. Clark changed the child's name, adding "McLeod" as a middle name; Dr. Clark entered a joint parenting plan for the child; Dr. Clark permitted and encouraged Dr. McLeod's participation in raising the child and encouraged bonding between the two; the child recognizes the parties as her "parents," and is doing very well in school and in every other way. The court further noted that Dr. Clark participated in creating these factors and that "she may not now ask this Court to disregard these factors." App. 61a. The Colorado Court of Appeals agreed. However, to take the court's determination to its logical conclusion, would mean that any parent who involves any other adult in their child's life cannot thereafter change their mind about such involvement. Any fit legal parent who takes a third party (be it a same-sex partner, a boyfriend, a relative, a neighbor, or *any* person or agency other than the child's natural or adoptive parent) into their child's life, and has a happy well-adjusted child is now subject to losing his or her parental rights, or at a minimum having to share them equally with the third party. This is clearly not the intent of *Troxel*.

By holding that the psychological parent need not show unfitness of the legal parent, and that any reduction in parental responsibilities is harmful, the Colorado Court of Appeals has created a presumption that the fit legal parent's decision is not in the best interest of her child. The Colorado Court of Appeals has shifted the burden from the third party to the fit legal parent. This is contrary to this Court's ruling in *Troxel* that the fit legal parent is presumed to act in the best interest of her child. In *Troxel*, this Court said that the trial judge presumed the grandparents' request for visitation should

be granted unless the children would be "impacted adversely." *Troxel*, at 69. "In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters." *Id.* "The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* By requiring the fit legal parent, Dr. Clark, to disprove harm to her child from her proposed parenting plan, the Colorado Court of Appeals made the same error that the trial court did in *Troxel*. While the Colorado Court of Appeals did say it was recognizing the *Troxel* presumption of Dr. Clark, by stating that it is always presumed there will be emotional injury to the child when decision making or parenting time for the psychological parent is reduced by any amount and that the psychological parent did not have to prove unfitness, the Colorado Court of Appeals in reality gave no material weight to Dr. Clark's having assented to parenting time and really gave no material weight to Dr. Clark's own determination regarding parental responsibilities. The Colorado Court of Appeals directly contravened the traditional presumption that a fit parent will act in the best interests of his or her child.

The United States Constitution makes no provision for a child to have two fathers, and by inference makes no provision for a child to have two mothers. *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (refusing to rule unconstitutional a California law that a child can have only one father). By giving a same-sex partner equal parental rights with the legal parent, the Colorado Court of Appeals has contravened not only *Troxel*, but also *Michael H. v. Gerald D.*, and given Dr. Clark's daughter two mothers.

C. Other State Court Decisions Support Petitioner's Argument.

Cases from other states have held that the non-parent must show that serious harm would occur if visitation was denied. In the case of *Blixt v. Blixt*, 774 N.E. 2d 1052 (Mass. 2002), the court ruled that "the State will not intrude into a nonintact family in the absence of a showing of *significant* harm." *Id.* at 1065 (emphasis added).) This means "the kinds of physical or emotional trauma that may scar a child . . . well into adulthood." *Id.* at 1064. Far from the lifelong trauma required by the *Blixt* court, the Colorado Court of Appeals ruled that any presumed emotional harm was sufficient to overcome the *Troxel* presumption, even though the trial court in this case did not find *any* harm would occur to the child if Dr. Clark's plan were adopted.

In Florida, the cases "have made it abundantly clear that the State can satisfy the compelling interest standard when it acts to prevent *demonstrable harm to a child*." *Von Eiff v. Azicri*, *supra*, at 515. (citing as a compelling state interest such examples as prevention of abuse, neglect, or death of a child; prevention of sexual exploitation of children in the home; need for reasonable medical treatment) (emphasis in original).[15] However, "the potential harm to a child flowing from the death of a parent does not constitute the kind of harm . . . found to authorize government intervention." *Id.*; *see also, Clark v. Wade, supra*, at 107. Surely any emotional difficulties Dr. Clark's daughter might suffer from a gradual reduction of parental responsibilities for Dr. McLeod would not approach the level of emotional trauma a child faces with the death of a parent.

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[15] The Florida Supreme Court discussed the protection of the family under both the Fourteenth Amendment and the Florida Constitution, but ultimately decided the case under the Florida Constitution.

As long as Dr. Clark is fit and is allowing parenting time to Dr. McLeod, the courts of Colorado have no cause to impose a parenting time arrangement contrary to that proposed by Dr. Clark. The Colorado Court of Appeals certainly has no constitutional basis for giving the psychological parent equal decision making rights for Dr. Clark's child. In doing so, the Colorado Courts acted contrary to established precedent. This Court has never decided if the Fourteenth Amendment rights of a legal parent to make decisions concerning the care, custody, and control of her children can be overcome by presumed emotional harm that might result from a reduction of parenting time with a psychological parent or a reduction in decision making by a psychological parent. This is a determination that should be made by the United States Supreme Court, not the State courts.

CONCLUSION

This Court should grant the petition and reverse the Judgment of the Colorado Court of Appeals.

Respectfully submitted,

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Dated January 21, 2005

APPENDIX A

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203

CERTIORARI TO THE COURT OF APPEALS
NO. 03CA1121
DISTRICT COURT, CITY & COUNTY OF DENVER,
96DR39

Case No. 04SC528

[Decided October 25, 2004]

In the Interest of E.L.M.C., a Child,	)
	)
Petitioner:	)
	)
CHERYL ANN CLARK,	)
	)
and	)
	)
Respondent:	)
	)
ELSEY MAXWELL MCLEOD.	)
	)

JUDGES: JUSTICE BENDER and JUSTICE RICE do not participate. JUSTICE COATS would grant.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 25, 2004.
JUSTICE BENDER and JUSTICE RICE do not participate.
JUSTICE COATS would grant as to the following issues.

Whether the court of appeals' discussion of psychological parenthood was consistent with section 14-10-123, 8 C.R.S. (2004).

If the court of appeals properly articulated the standard for psychological parenthood in light of section 14-10-123, whether section 14-10-123 violates the Fourteenth Amendment as applied to this case in light of *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

Whether risk of emotional harm that would be caused by the loss of a psychological parent is a "special factor" under *Troxel*.

Copies mailed via the State's Mail Services Division on 10/25/04. MLK

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APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 03CA1121
City and County of Denver District Court No. 96DR39
Honorable John W. Coughlin, Judge

[Decided July 1, 2004]

In the Interest of E.L.M.C., a Child,	)
	)
and Concerning Cheryl Ann Clark,	)
	)
Appellant,	)
	)
and Elsey Maxwell McLeod,	)
	)
Appellee.	)
	)

ORDER AFFIRMED IN PART, VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE WEBB
Nieto and Russel, JJ., concur

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JUDGES: Opinion by JUDGE WEBB. Nieto and Russel, JJ., concur.

OPINION

In this proceeding concerning statutory allocation of parental responsibilities for E.L.M.C., a minor child, Cheryl Ann Clark, the child's adoptive mother, appeals the trial court's order awarding joint parental responsibilities, except for religion and dental care, to Elsey Maxwell McLeod, Clark's former domestic partner. Clark also appeals the

order's prohibition against her exposing E.L.M.C. to "religious upbringing or teaching . . . that can be considered homophobic."

This case illustrates the evolving nature of parenthood. *See N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000)("Parenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities."); *see also Troxel v. Granville*, 530 U.S. 57, 63, 120 S. Ct. 2054, 2059, 147 L. Ed. 2d 49 (2000)("The demographic changes of the past century make it difficult to speak of an average American family.").

Clark relies primarily on *Troxel, supra*. There, the Supreme Court held a state grandparent visitation statute unconstitutional, as applied, because the order for grandparent visitation unjustifiably interfered with the natural mother's due process right to make decisions concerning the care, custody, and control of her children.

Hence, we consider whether here, in light of *Troxel*, the trial court's award of joint parental responsibilities to McLeod, neither a natural nor an adoptive parent, under § § 14-10-123, 14-10-123.4, and 14-10-124(1.5), C.R.S. 2003, unconstitutionally interferes with Clark's fundamental right as the fit, legal parent to make decisions regarding E.L.M.C. We affirm the trial court's parental responsibilities allocation on the basis that McLeod had become E.L.M.C.'s psychological parent, E.L.M.C.'s continuous recognition of McLeod as a parent almost from birth, E.L.M.C.'s age -- nine years when the trial court entered permanent orders -- and the risk of emotional harm to her inherent in Clark's parenting plan, which curtailed and then terminated McLeod's

court-ordered parenting time. Whether a child's best interests could justify subordinating a legal parent's constitutional rights to the claim of a nonparent seeking parental responsibilities, without the threat of emotional harm, is a question we leave for another day.

We also consider whether the prohibition against homophobic religious teachings impermissibly invades Clark's rights to control the religious upbringing of E.L.M.C. under the Free Exercise Clause of the First Amendment to the United States Constitution and its Colorado counterpart. We vacate the order as to this limitation and remand this aspect of the case to the trial court for findings required by § 14-10-130(1), C.R.S. 2003, which are also necessary to resolve the First Amendment issue.

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I. Facts

The trial court found, with record support, the following facts. Clark and McLeod lived in a committed relationship for eleven years before this action; they owned a home in joint tenancy, had a commitment ceremony, and discussed having a child through in vitro fertilization or by adoption. In 1994, Clark began the process of applying for the adoption of a child from China.

The social worker who performed the background check for the adoption indicated China would not permit an adoption by a same-sex couple. For this reason, the adoption papers were made out in the name of Clark alone. However, Clark and McLeod traveled to China together, where Clark adopted E.L.M.C., who was then about six months old.

Shortly thereafter, Colorado recognized Clark's adoption of E.L.M.C. Clark and McLeod sent an "arrival announcement" to friends:

> [E.L.M.C.] was born in the Hunan providence of the People's Republic of China. She lived the first six months of her life in the Yue Yang Children's Welfare Home in Yue Yang, China. She now lives with two adoring moms. [McLeod] and [Clark] live in Denver, Colorado.

The couple filed a joint "Petition for Custody" under § 14-10-123 with Clark as a parent and McLeod as a nonparent in 1996. The petition for custody stated:

> Co-Petitioners have lived together for the past six and one-half years as a couple. They had a commitment ceremony on July 31, 1993. They carefully discussed having a family together. Clark's plans to adopt [E.L.M.C.] included an intention to have [E.L.M.C.] raised by Clark and McLeod as one family with two parents.

The joint trial brief submitted in support of the petition for custody stated, in pertinent part:

> [E.L.M.C.] considers each of the Co-Petitioners to be a parent; she refers to McLeod as "mommy" and Clark as "momma." She looks to both Co-Petitioners for love, affection and nurturance. Co-Petitioners have shared the financial cost of supporting [E.L.M.C.] and they share all major decisions involving [E.L.M.C.'s] life, including provisions of daycare during the times that Co-Petitioners must both work.

The district court awarded joint custody of E.L.M.C. to Clark and McLeod. Neither party appealed.

Clark also petitioned to change the child's name to include McLeod's name "to acknowledge an important family member instrumental to [the child's] adoption from China." Clark signed the pediatrician's information sheet that identified McLeod as a "mother." Both women were listed as mothers of the child in the school directory.

The child's nanny testified that both Clark and McLeod interviewed her for the job and that, during her approximately two and one-half years of caring for E.L.M.C., she observed that they were equally parenting the child.

When the relationship between Clark and McLeod began to fail, approximately five years after the joint custody award and six years after the adoption, Clark sent a letter to McLeod, stating, in relevant part:

> As I review the last two and one-half years since we adopted [E.L.M.C.], I see several areas that plague and distress me. First of all, shortly after we got back from China we started to talk about ways to protect your legal relationship with [E.L.M.C.]. This was important to both of us and we pursued and accomplished that the best we can in Colorado . . . we changed [E.L.M.C.'s] name to include yours. I changed my will before we left to designate you as her guardian should anything happen to me, and we pursued joint custody. All these actions work towards protecting your family integrity and specifically your relationship, legally, with [E.L.M.C.] . . . .
>
> You attached to [E.L.M.C.] so strongly that I felt that I could not get in; that you would not let me in as you bonded to [her]. I have watched this attachment to her from the beginning and while much of it is wonderful . . . I also feel that you leave me out and had not really responded to my several requests to help me with that.

Thus, although Clark was the only legal parent, the record supports the trial court's conclusion that it was "abundantly clear" both women intended to, and did, coparent E.L.M.C.

In 2001, after the parties' relationship ended and a dispute over parenting time arose, Clark sought to restrict McLeod to ten overnights per month in 2003 and six overnights per month in 2004, and to terminate all court-ordered parenting time in 2005. McLeod petitioned for roughly equal parenting time.

Clark filed a motion for temporary orders and challenged the validity of the 1996 joint custody order. A magistrate declared the joint custody order void on the basis that the district court lacked jurisdiction because no controversy existed between the parties, but temporarily ordered joint parenting time and joint decision-making. Clark's appeal of the magistrate's order to this court was dismissed without prejudice because no final order had been entered by the district court.

After a hearing on permanent orders, the trial court concluded that jurisdiction over the initial joint custody proceedings was proper and that, even if that court had lacked jurisdiction, the magistrate could not declare void the joint custody award of a district court judge. Nevertheless, without either relying on the joint custody award or otherwise explaining the basis for its jurisdiction over the parental responsibilities proceedings, the trial court awarded joint parental responsibilities to Clark and McLeod, except in the areas of dental care and religion, where it awarded sole parental responsibilities to Clark. The court also prohibited Clark from exposing E.L.M.C. to "homophobic" religious teachings.

II. Legal Framework

According to Clark, *Troxel* requires departure from *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995), which held

that, under § 14-10-123, the best interests of the child standard permits a parental responsibilities dispute between a fit, legal parent and a psychological parent to be resolved in favor of the psychological parent. Clark challenges § 14-10-123 as applied to her, not on its face.

As a preliminary matter, McLeod contends "the fact that E.L.M.C.'s psychological parent is the same gender as her adoptive parent is not relevant." For purposes of applying the psychological parent doctrine here, we agree. *See T.B. v. L.R.M.*, 567 Pa. 222, 232, 786 A.2d 913, 918-19 (2001)("The nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands in loco parentis to [Appellant's child]. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed parental status and discharged parental duties.").

Although McLeod does not dispute that Clark is E.L.M.C.'s only legal parent and is a fit parent, McLeod further contends that the best interests standard, as applied in *C.C.R.S.*, still controls this case, because she is the child's psychological parent. We uphold the trial court's allocation of equal parental responsibilities to McLeod, but on narrower grounds.

We begin with a discussion of *C.C.R.S.* and *Troxel*. We conclude that, although *Troxel* did not specify the standard of review, statutory interference with the constitutional rights of a fit, legal parent should be subjected to strict scrutiny.

A. *In re Custody of C.C.R.S.*

In *C.C.R.S.*, the supreme court held that the best interests standard was applicable under § 14-10-123 to resolve a custody dispute between a fit, natural parent and potential adoptive parents, whom the court treated as psychological parents because they had cared for the child since birth. The court noted that the child's "best interests," which encompass "physical, mental, and emotional conditions and needs of the child," § 14-10-124(1.5), were of paramount consideration in all custody proceedings. Thus, the court gave priority "to resolving the dispute in a way that minimizes the detriment to the child." *C.C.R.S., supra*, 892 P.2d at 257-58.

The court recognized the "presumption that the biological parent has a first and prior right to custody," *C.C.R.S., supra*, 892 P.2d at 256, but concluded that unfitness of the natural parent need not be established to award custody to nonparents. Based on the best interests standard, the court upheld the trial court's award of custody to the prospective adoptive parents. It explained that "[r]emoving C.C.R.S. from the parents he has known, with whom he has emotionally bonded, and giving custody to his biological mother, who is virtually a stranger to him, ignores the welfare of the child and is likely to have a detrimental effect on his emotional and psychological well-being." *C.C.R.S., supra*, 892 P.2d at 258.

B. *Troxel v. Granville*

Five years after the decision in *C.C.R.S.*, the *Troxel* Court considered whether application of Washington's grandparent visitation statute to Granville and her daughters violated Granville's due process right to make decisions concerning the custody, care, and control of her children. The

grandparents sought visitation under a Washington statute that provided "any person" could petition for visitation rights at "any time." *Troxel, supra*, 530 U.S. at 61, 120 S. Ct. at 2057. They did not rely on a common law psychological or de facto parent doctrine.

Justice O'Connor, writing for the plurality, began by explaining "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel, supra*, 530 U.S. at 66, 120 S. Ct. at 2060. The plurality noted that in this right inheres a presumption a fit parent will act in the best interests of his or her child.

The plurality held that Washington's visitation statute, as applied to Granville, unconstitutionally infringed on her fundamental right to direct the upbringing of her daughters. The plurality set forth three reasons supporting its conclusion that no "special factors" existed to justify the state's interference with this fundamental right. *Troxel, supra*, 530 U.S. at 68, 120 S. Ct. at 2061.

First, because parental unfitness was not alleged, Granville was presumed to act in the best interests of her daughters in limiting grandparent visitation. Second, when the court intervened, it gave no special weight to Granville's determination of her daughters' best interests. Third, Granville had not sought to eliminate grandparent visitation entirely, but only to restrict it.

Nevertheless, the *Troxel* plurality declined to address "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting

visitation," 530 U.S. at 73, 120 S. Ct. at 2064, and whether parental unfitness was a condition precedent to overriding a parent's determination of the children's best interests. It also declined to define the appropriate level of scrutiny and "the precise scope of the parental due process right in the visitation context." *Troxel, supra*, 530 U.S. at 73, 120 S. Ct. at 2064.

Neither the Colorado Supreme Court nor any division of this court has resolved these questions since *Troxel*. Further, since *Troxel*, no Colorado appellate opinion has decided the constitutional standard for resolving parental responsibility disputes between a legal parent and a psychological parent. *See People in Interest of A.M.K.*, 68 P.3d 563 (Colo. App. 2003) (facial challenge to § 14-10-123(1)(b) and (c), C.R.S. 2003, not considered because attorney general not notified as required under § 13-51-115, C.R.S. 2003; Vogt, J., concurring specially to emphasize the *Troxel* presumption of the legal parent's first and prior right to custody may be rebutted by evidence establishing that the child's welfare is better served by granting custody to a nonparent).

Thus, we must determine the contours of a parent's due process right before resolving whether the Colorado statutes relied on by the trial court here are constitutional as applied.

C. Level of Scrutiny

While the *Troxel* plurality opinion did not declare all nonparental visitation statutes per se unconstitutional, it cautioned that "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State" to interfere with the parent's ability "to make the best decisions concerning the rearing of that parent's children." *Troxel, supra*, 530 U.S. at 68-69, 120 S. Ct. at 2061.

Applications for parental responsibilities -- parenting time and decision-making responsibilities -- by a nonparent implicate the constitutional right to family autonomy and privacy. "A legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible." *In re Custody of C.M.*, 74 P.3d 342, 344 (Colo. App. 2002)(citing *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)). *See generally Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002)(for a statute to withstand strict scrutiny when state action has implicated fundamental rights, the state must show a compelling interest).

Hence, consistent with *Troxel*'s acknowledgment that this right "is perhaps the oldest of the fundamental liberty interests recognized by [the] Court," *Troxel, supra*, 530 U.S. at 65, 120 S. Ct. at 2060, we join those courts that have concluded the strict scrutiny test applies to statutes which infringe on the parent-child relationship. *See Roth v. Weston*, 259 Conn. 202, 789 A.2d 431, 441 (Conn. 2002) ("the application of the strict scrutiny test is required to any infringement [the parent-child relationship] may suffer"); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052, 1059 (Mass. 2002)(examining grandparent visitation statute and noting that strict scrutiny requires compelling state interest to justify state action and careful examination to ascertain whether the action was "narrowly tailored to further [that] interest"); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203, 214 (N.J. 2003)("When the State seeks, by statute, to interfere with family and parental autonomy, a fundamental right is at issue. That statute thus is subject to strict scrutiny and will only pass constitutional muster if it is narrowly tailored to serve a compelling state interest.").

We next consider whether the jurisdictional and substantive provisions of §§ 14-10-123, 14-10-123.4, and 14-10-124(1.5), on which the trial court relied, were applied narrowly to achieve a compelling state interest.

III. Jurisdiction

The parties dispute whether the trial court could exercise jurisdiction over McLeod under § 14-10-123(1)(c) of Colorado's Uniform Dissolution of Marriage Act. We conclude the trial court properly found facts consistent with the psychological parent doctrine, as implicitly recognized by this subsection, which appropriately restricts jurisdiction over a nonparent's petition for parental responsibilities to limited circumstances.

The General Assembly has specifically authorized nonparents to seek parental responsibilities. *See* § 14-10-123(1)(b)-(c). "Parental responsibility" includes both "parenting time" and "decision-making responsibilities." Sections 14-10-103(4), 14-10-124(1.5), C.R.S. 2003; *In re Marriage of Roosa*, 89 P.3d 524 (Colo. App. 2004).

As pertinent here, under § 14-10-123 proceedings may be commenced:

> (1)(b) By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical care of one of the child's parents;

> (c) By a person other than a parent who has had physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care.

"Subsection [(1)](c), which was adopted later and is not contained in the Uniform Act, implements the Colorado General Assembly's recognition of 'psychological parenting.'" *In re K.M.B.*, 80 P.3d 914, 916 (Colo. App. 2003); *see also C.C.R.S., supra*, 892 P.2d at 252 ("The adoption of this section constitutes legislative recognition of the effects of 'psychological parenting' upon the best interests of a child."); *In re V.R.P.F.*, 939 P.2d 512, 514 (Colo. App. 1997)(this "statutory grant of standing to a non-parent to seek [parental responsibilities for] a child constitutes legislative recognition of the importance of 'psychological parenting' to the best interests of a child").

A determination of "physical care" includes "the amount of time a child has spent in the actual, physical possession of a non-parent and the psychological bonds non-parents develop with children who have been in their physical possession and control for a significant period of time." *C.C.R.S., supra*, 892 P.2d at 253 (defining "physical custody," prior to the General Assembly's 1998 amendment changing "physical custody" to "physical care," for purposes of jurisdiction under § 14-10-123(1)(c)).

Under a strict scrutiny analysis, the jurisdictional requirements of subsection (1)(c), which create standing in nonparents, must be applied narrowly. "Where fundamental rights are implicated, such as in the present case, standing serves a function beyond a mere jurisdictional prerequisite. It also ensures that the statutory scheme is narrowly tailored so that a person's personal affairs are not needlessly intruded

upon and interrupted by the trauma of litigation." *Roth v. Weston, supra*, 789 A.2d at 442 (considering standard required for legislative intrusions into parent-child relationship arising from a claim by a third party).

Subsection (1)(c) limits jurisdiction to "the class of nonparents who may seek parental responsibilities to only those individuals who have had a recent or continuing role as a caretaker" and thereby "protects against undue interference with the parent-child relationship." *In re K.M.B., supra*, 80 P.3d at 917. Thus, proof of the nature of a parent-like relationship between a person seeking parental responsibilities and the child provides the restrictive jurisdictional safeguards necessary to prevent families from having to defend against unjustified petitions for parental responsibilities. *See Troxel, supra*.

Nevertheless, Clark argues that three additional requirements must be met under subsection (1)(c) before the district court can exercise jurisdiction over a nonparent's petition for parental responsibility: the nonparent must have a legal relationship either to the parent or to the child; the nonparent must petition for responsibilities incident to a dissolution proceeding; and the parent must relinquish, and the nonparent exclusively have, physical care of the child. We reject each of Clark's proposed jurisdictional limits in turn.

A. Legal Relationship

We first reject Clark's argument that, to commence parental responsibility proceedings under subsection (1)(c), a nonparent must have a legal relationship to the parent or the minor child.

Subsection (1)(c) permits commencement of parental responsibility proceedings "by a person other than a parent." Thus, by its plain terms, subsection (1)(c) establishes that any nonparent may commence parental responsibility proceedings so long as the nonparent had physical care of the child for at least six months. It contains no qualifying language such as, "by a person other than a parent, who has a legal relationship with the parent or child." Nonparents "may include friends, relatives, grandparents, step-parents or child-care agencies, or, in other words any person or agency other than the child's natural parent." *C.C.R.S., supra*, 892 P.2d at 256 n.23 (emphasis added)(determining potential adoptive parents' ability to seek parental responsibility under § 14-10-123(1)(b) and (c), quoting 2 Homer H. Clark, *The Law of Domestic Relations in The United States* § 20.6, at 525 (2d ed. 1987)); *In re K.M.B., supra* (interpreting the phrase, "by a person other than a parent" in § 14-10-123(1)(b) to include any nonparent).

Hence, consistent with the General Assembly's recognition of the psychological parent doctrine, jurisdiction under subsection (1)(c) turns not on the nature of the legal relationships among the parties, but on the quality of the relationship between the nonparent and the child.

Accordingly, we conclude that, by its plain and unambiguous wording, § 14-10-123(1)(c) does not require the nonparent seeking parental responsibilities to have a legal relationship with either the parent or the child. *See In re Marriage of Hannum*, 796 P.2d 57 (Colo. App. 1990)(if a statute is explicit and free from ambiguity, there is no room for interpretation or construction beyond giving effect to common and accepted meaning of words employed in the act, and resort should never be had to a strained interpretation).

B. Incident to Dissolution Proceedings

Clark also argues that McLeod, as a nonparent, could not litigate parental responsibilities because her petition was not incidental to a dissolution proceeding. We disagree.

A nonparent's petition for parental responsibility need not be incidental to the dissolution of marriage. *See In re Davis*, 656 P.2d 42 (Colo. App. 1982)(petition for legal custody need not be brought by a parent or be incidental to dissolution of marriage proceeding for court to have jurisdiction under § 14-10-123(1); grandmother and stepfather of child's legal father could petition under § 14-10-123(1)(b) for legal custody of child after death of daughter-in-law).

C. Exclusive Physical Care

Focusing on the word "the" in the phrase, "the physical care," Clark further argues that McLeod cannot seek parental responsibilities under § 14-10-123(1)(c) because Clark never relinquished, and McLeod never had exclusive, physical care of E.L.M.C. Again, we disagree.

We construe a statute to determine and give effect to the intent of the General Assembly. In interpreting a statute, words and phrases are to be given their plain and ordinary meaning, and a consistent, harmonious, and sensible effect is to be given all its parts. Where "the language of a statute is clear and unambiguous, it must be applied as written, and the court need not resort to other rules of statutory construction." *In re K.M.B., supra*, 80 P.3d at 916.

Subsection (1)(c) permits a nonparent to seek parental responsibilities if he or she has had "the physical care" of the child for a period of more than six months. This subsection

contains no qualifiers, such as "the exclusive physical care." Nor does it require, as does subsection (1)(b), that the child not be "in the physical care of one of the child's parents." Had the legislature intended that the nonparent's physical care of the child be in the complete absence of the parent's physical care under subsection (1)(c), it could have so stated. *People in Interest of J.R.T.*, 55 P.3d 217 (Colo. App. 2002), *aff'd*, 70 P.3d 474 (Colo. 2003).

Accordingly, we conclude that, by its plain language, subsection (1)(c) applies even where the nonparent's physical care of the child is not exclusive of the parent's. *See In re K.M.B., supra*, 80 P.3d at 916-17 (subsection (1)(c) "applies even when the child's parents have retained some measure of caretaking responsibility"); *In re Marriage of Dureno*, 854 P.2d 1352 (Colo. App. 1992)(stepfather jurisdictionally capable of litigating custody under § 14-10-123(1) where he had physical custody of the child jointly with his wife); *In re Marriage of Tricamo*, 42 Colo. App. 493, 599 P.2d 273 (1979)(upholding jurisdiction under § 14-10-123(1)(c) over former husband who, while neither the natural nor adoptive parent, had joint physical custody of child with his wife for a number of years).

D. Petition Within Six Months

As a separate procedural matter, Clark asserts McLeod failed to petition for parental responsibilities within six months of her physical care for E.L.M.C. being terminated. We are not persuaded.

Section 14-10-123 sets forth jurisdictional requirements for the allocation of "parental responsibilities," which, as noted above, include both "parenting time and "decision-making responsibilities." *In re Marriage of Roosa, supra.*

Section 14-10-124(1.5) specifies how a court, which has obtained jurisdiction under § 14-10-123, should allocate, on the motion of either party or on its own motion, parental responsibilities. Thus, McLeod's motion for parenting time under § 14-10-124 seeks parental responsibilities and was filed within six months of her departure from the joint residence. Therefore, McLeod timely moved for parental responsibilities under § 14-10-123(1)(c).

In sum, because the trial court found, with record support, that McLeod provided financial support to and assisted in raising E.L.M.C., we conclude the trial court properly exercised jurisdiction over McLeod's timely motion for parental responsibilities under § 14-10-123(1)(c). *Cf. C.C.R.S., supra*, 892 P.2d at 253 (listing similar factors in "physical custody" determination).

IV. Allocation of Parental Responsibilities

We now turn to whether, under §§ 14-10-123, 14-10-123.4, and 14-10-124(1.5), the trial court's findings reflect sufficiently compelling reasons to warrant interference with Clark's parenting plan, notwithstanding her constitutional rights as the child's sole, and fit, legal parent. We conclude they do.

"Axiomatic to the exercise of judicial authority is the principle that a court should not decide a constitutional issue unless and until [the] issue is actually raised by a party to the controversy and the necessity for such decision is clear and inescapable." *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985); *see also People v. Bossert*, 722 P.2d 998 (Colo. 1986). Hence, our role in reviewing the constitutionality of a statute as applied must necessarily be limited by the facts in the case before us, as informed by federal and Colorado law. *United*

States v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960)(an appellate court should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied).

We begin with a review of the limits a state can impose on a fit parent's fundamental liberty interest in the parent-child relationship, as recognized by the United States Supreme Court. Next, we consider various tests enunciated by other jurisdictions since *Troxel* concerning parental unfitness, harm to the child, and psychological parenthood. Finally, we turn to Colorado law concerning a psychological parent's role in the best interests of the child and conclude that the particular findings before us show a compelling interest to implement a parenting plan different from Clark's.

We reject Clark's contention that a showing of her unfitness was required before parental responsibilities could be allocated to McLeod. We need not answer Clark's further argument that the child's best interests alone are inadequate to support a grant of parental responsibilities to a nonparent, over the objection of a fit, legal parent, because the trial court found facts showing that McLeod was E.L.M.C.'s psychological parent from birth, a relationship Clark consented to and encouraged but then sought to restrict significantly, thus threatening emotional harm to E.L.M.C.

A. Federal Constitutional Considerations

The family is not beyond state regulation. *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Limits on a parent's fundamental right to control the child's upbringing arise out of the state's interest as *parens patriae* ("parent of the country"). Thus, a state may exercise

its *parens patriae* authority to guard children against imminent physical harm. *See, e.g., Prince v. Massachusetts, supra*, 321 U.S. at 166-67, 64 S. Ct. at 442 (recognizing when circumstances place child in imminent danger, or affect the child's well-being, state could properly intrude on that "private realm of family life" to protect child from harm).

Harm in this traditional sense is not, however, the only compelling state interest when the welfare of children is at issue. For example, the state's compelling interest in requiring school attendance or restricting child labor does not derive exclusively from the state's interest in preventing harm, but instead stems from the state's broader *parens patriae* interest in the well-being of children. *See Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 2504, 61 L. Ed. 2d 101 (1979)("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

Nor will the Fourteenth Amendment procedural due process rights of a child's biological parent always outweigh those of other parties asserting parental rights. For example, in *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 555, 54 L. Ed. 2d 511, 520 (1978), a biological parent's constitutional rights were accorded less weight than those of a married, but neither biological nor adoptive, father who had "borne full responsibility for the rearing of his children during the period of the marriage" where the biological parent "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *See also Lehr v. Robertson*, 463 U.S. 248, 259-60, 103 S. Ct. 2985, 2992, 77 L. Ed. 2d 614 (1983)(biological father's mere genetic relationship to child did not allow him

to block a nonbiological parent's adoption because of the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility"); *cf. Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844, 97 S. Ct. 2094, 2109, 53 L. Ed. 2d 14 (1977)(emotional bond between child and foster parents required that foster parents be afforded minimum due process rights before removal of children from foster home; "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children as well as from the fact of blood relationship"; quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33, 92 S. Ct. 1526, 1541-42, 32 L. Ed. 2d 15 (1972)).

Further, under certain circumstances, even the existence of a developed biological parent-child relationship will not prevent nonparents from acquiring parental rights vis-a-vis the child. *See, e.g., Troxel*, 530 U.S. at 68, 120 S. Ct. at 2061 ("special factors . . . might justify the State's interference with [the biological mother's] fundamental right to make decisions concerning the rearing of her [children]"); *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989).

In *Michael H.*, the Supreme Court held that, despite both biological parenthood and an established relationship with his young child, the father's substantive due process right to maintain some connection with the child was not sufficient to overcome California's presumption that the husband of the child's mother was the child's parent. Thus, the Court recognized that a developed relationship within a family unit between a nonbiological parent and a child may, under certain circumstances, warrant more legal protection by a state than

the equally developed relationship between the child and the biological parent outside the family unit. *See also In re Marriage of Ohr*, 97 P.3d 354 (Colo. App. 2004)(discussing *Michael H.* and noting that "once legal fatherhood has been determined to reside elsewhere, a biological father has no constitutional right of visitation or association with a child; for all intents and purposes, the biological father is a nonparent").

However, this broadened concept of family is not dispositive of our analysis because, as previously indicated, *Troxel* did not resolve exactly what compelling state interests subordinate the substantive due process rights and attendant presumptions accorded a fit, legal parent in a dispute with a nonparent over parental responsibilities.

B. Parental Unfitness and Harm

A number of jurisdictions considering nonparents' assertions of parental rights, including Colorado, reject a requirement that a parent be found unfit before interfering with the parent's parenting plan. *See Downs v. Scheffler*, 206 Ariz. 496, 80 P.3d 775 (Ariz. Ct. App. 2003); *C.C.R.S., supra* (rejecting parental unfitness standard in favor of the best interests of the child test in contest between biological mother and psychological parents); *Roth v. Weston, supra; Rideout v. Riendeau*, 2000 ME 198, 761 A.2d 291 (Me. 2000); *Blixt v. Blixt, supra; Moriarty v. Bradt, supra; Williams v. Williams*, 132 N.M. 445, 50 P.3d 194 (N.M. Ct. App. 2002); *see also Wilson v. Mitchell*, 48 Colo. 454, 465, 111 P. 21, 25 (1910)(while natural parents have a first and prior right to custody, no requirement that custody be awarded to parent or parents merely because the evidence shows fitness and ability to care for child; controlling factor is welfare of the child).

Further, *Troxel* did not decide whether a finding of unfitness is a condition precedent to recognizing rights of a nonparent. *See People in Interest of A.M.K., supra* (rejecting father's argument that unfitness must be shown to interfere with fundamental right to direct upbringing of child); *In re R.A.*, 66 P.3d 146 (Colo. App. 2002)(adhering to rejection of unfitness standard in *C.C.R.S.*, notwithstanding *Troxel*).

Hence, we are persuaded by the view that, despite *Troxel*, parental unfitness need not be shown.

A number of jurisdictions applying strict scrutiny analysis to their nonparental visitation statutes also require a showing of actual or threatened physical or emotional harm to the child, thus implicitly requiring more than bare best interests. *See Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004)(to overcome parental preference for custody of child, nonparent must show parent is unfit or that welfare of child requires placement in custody of nonparent); *Roth v. Weston, supra* (requiring substantial emotional harm to justify court intervention); *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996) (state can satisfy compelling interest required under state constitution when acting to prevent harm); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, 773 n.5 (Ga. 1995)("The 'best interest of the child' standard does not come into play to permit interference with the custody and control of the child, over parental objection, unless and until there is a showing of harm to the child without that interference."); *Moriarty v. Bradt, supra* (requiring threat of harm to child's welfare to infringe on right of parents to raise their children as they see fit); *In re Herbst*, 971 P.2d 395, 399 (Okla. 1998)("To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm . . . . Absent a showing of harm (or threat thereof) it is not for the state to choose which associations a family must maintain and

which the family is permitted to abandon."); *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993)(requiring "an initial showing of harm . . . before the state may intervene to determine the 'best interests of the child'"); *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (Va. 1998) (quoting Virginia Court of Appeals decision, 24 Va. App. 778, 485 S.E.2d 651, 654, in same case: "Before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the 'best interests' standard in determining visitation only after it finds harm if visitation is not ordered.").

Moreover, in cases involving a fit, legal parent's constitutional rights, the best interests of the child standard has been criticized as indeterminate, thus leading to unpredictable results. *See Roth v. Weston, supra*. Indeed, *Troxel* cautions that a judge should not find the presumption that a parent acts in the child's best interests rebutted merely because the judge believes a "better decision" could be made.

As the Maine Supreme Court noted:

> What is best for children depends upon values and norms upon which reasonable people differ. Broad room for debate means a broad and unpredictable array of possible outcomes in any custody contest. That fact encourages prolonged and expensive litigation and "strategic behaviors" of the parents, neither of which usually benefits children.

Rideout v. Riendeau, supra at 296 n.5 (quoting Honorable John C. Sheldon, *Anticipating the American Law Institute's Principles of the Law of Family Dissolution*, 14 Me. B.J. 18, 25 (1999)(citations omitted)).

However, contrary authority exists. *See, e.g., State v. Paillet*, 270 Kan. 646, 16 P.3d 962 (2001)(due process requirements met under statute that requires presumption that fit parent acts in best interest of child and places burden to show otherwise on petitioner); *Zeman v. Stanford*, 789 So. 2d 798, 804 (Miss. 2001)(noting that "best interest of the child" is paramount consideration); *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 762-63, 551 S.E.2d 674, 684 (2001)(concluding that two-prong standard of best interests of child and lack of substantial interference with parents' right meets *Troxel* requirements).

Indeed, the Colorado Supreme Court has continued to emphasize that "the overarching goal in all adoption and custody proceedings is the best interests of the child." *People in Interest of A.J.C.*, 88 P.3d 599, 604 (Colo. 2004); *see also N.A.H. v. S.L.S., supra*, 9 P.3d at 366 (noting that the General Assembly has defined the best interests of the child under § 14-10-124 and that "when presumptions of paternity arise in more than one potential father, trial courts must take the best interests of the child into account as part of policy and logic in resolving competing presumptions"). However, since *Troxel* the court has not applied the best interests test to resolve a parental responsibilities dispute between a fit, legal parent and a nonparent.

In such cases, use of the best interests test to discern a compelling state interest could be problematic. On the one hand, every ruling on parental responsibilities that protects a child from harm also furthers the child's best interests. *See* § 14-10-124(1.5)(paramount consideration given to "physical, mental, and emotional conditions and needs of the child"). On the other hand, however, not all best interests determinations are necessary to avoid harm. *See Rideout v. Riendeau, supra*, 761 A.2d at 310 (the best interests standard "delegates to

judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute").

Accordingly, we further conclude that, consistent with existing federal limitations on a parent's fundamental right to direct the upbringing of the child, proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights. Hence, we do not determine whether a showing of actual or threatened emotional harm is necessary in every case to establish such a compelling state interest.

C. The Psychological Parent Doctrine and Harm

The importance of a psychological parent to the child has long been considered in applying Colorado's best interests of the child standard. *C.C.R.S., supra* (determining in a custody contest between biological parents and psychological parents, best interests of child standard is prevailing determination); *Root v. Allen*, 151 Colo. 311, 377 P.2d 117 (1962)(if child were to leave her psychological father with whom she lived for many years, effect would be very damaging); *Devlin v. Huffman*, 139 Colo. 417, 339 P.2d 1008 (1959)(grandparents who had physical custody of children for six months awarded custody based on best interests of child); *Coulter v. Coulter*, 141 Colo. 237, 347 P.2d 492 (1959)(paternal grandmother awarded custody over natural, fit mother); *In re K.M.B., supra* (recognizing benefits of psychological parent to child); *In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002)(defining psychological parent and noting potential for harm to child in break-up of relationship). *See generally* § 14-10-123.4 (a child has a statutory right to have parental responsibilities allocated in its best interests); § 14-10-

124(1.5) (trial court must consider all relevant factors, including those enumerated in the statute).

Courts in other jurisdictions faced with custody disputes between natural or legal parents and nonparents similarly recognize the psychological parent doctrine, based on the importance of a child's maintaining emotional attachments to long-term, but legally unrelated, caretakers and hold that custody should be decided in the way which avoids harm arising from disruption of that relationship. *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982)(acknowledging that stepparents who stand in loco parentis have ability to petition for visitation); *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979)(parent who stands in loco parentis may petition for custody); *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999)(trial court had jurisdiction to award visitation between child and de facto parent; lesbian couple planned a pregnancy together, supported each other during the pregnancy and childbirth, gave child both of their last names, and raised child as their own for several years, expressing publicly that the child had two mothers); *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539 (N.J. 2000)(same-sex partner of biological mother who had assumed a parental role in helping to raise the biological mother's child had established a "psychological parenthood" with respect to child and thus had legal right to petition for custody and visitation); *State ex rel. J.W.F.*, 799 P.2d 710, 714 (Utah 1990)("The fact that a person is not a child's natural or legal parent does not mean that he or she must stand as a total stranger to the child where custody is concerned. Certain people, because of their relationship to a child, are at least entitled to standing to seek a determination as to whether it would be in the best interests of the child for them to have custody."); *In re Parentage of L.B.*, 121 Wash. App. 460, 89 P.3d 271, 280 (Wash. Ct. App. 2004)("Washington courts often have recognized that parent-

child bonds form regardless of biology or statutes providing traditional parental rights" and likewise recognize the importance of the psychological bond between a child and caregiver); *In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (1995)(outlining four-prong test for establishing de facto parent relationship; equitable authority to consider petition by woman who had helped her same-sex partner to conceive and raise child after couple separated if petitioner proved existence of parent-like relationship with child and a triggering factor, such as denial of all visitation with child).

Who may be deemed a psychological parent for the purposes of seeking and receiving an award of parental responsibilities has been variously defined. Common to these definitions is a relationship with deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance.

A division of this court has defined "psychological parent" as "someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child." *In re Marriage of Martin, supra*, 42 P.3d at 77-78 (citing Joseph Goldstein et al., *The Best Interests of the Child: The Least Detrimental Alternative* 11-13, 104, 105 (1996)).

Again, other jurisdictions are in accord. *See Carter v Brodrick, supra*, 644 P.2d at 853 n. 2 (quoting Gruenberg & Mackey, *A New Direction for Child Custody in Alaska*, 6 U.C.L.A.-Alaska L. Rev. 34, 36 (1976): A psychological parent is "one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he is not

only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs."); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (declining to ultimately define de facto parent, but noting "it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life"); *E.N.O. v. L.N.M., supra*, 711 N.E.2d at 891 ("The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent [and] shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." (citation omitted)).

Some courts have set forth a more specific four-factor test to determine whether a nonparent is a psychological parent: (1) the legal parent consented to and fostered the nonparent's formation and establishment of a parent-like relationship between the nonparent and the child; (2) the nonparent and the child lived together in the same household; (3) the nonparent assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation, and (4) the nonparent has established a parental role sufficient to create with the child a bonded, dependent relationship parental in nature. *See V.C. v. M.J.B., supra; Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Custody of H.S.H.-K., supra.*

These four factors ensure that a nonparent's eligibility for psychological parent treatment with respect to an unrelated child will be strictly limited. The first factor contains an estoppel-like element and recognizes that, where a legal

parent has fostered a parent-like relationship between her child and a nonparent, "the right of the legal parent '[does] not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's [sic] separation she regretted having done so.'" *V.C. v. M.J.B., supra*, 748 A.2d at 552 (quoting *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314, 1322 (1996))(legal parent has absolute ability to maintain zone of autonomous privacy for herself and her family; fundamental right protecting against state interference in parent-child relationship is personal to the parent, and that protection may be diminished by the parent's actions); *see also Rubano v. DiCenzo, supra*, 759 A.2d at 976 (when legal parent allows third party to assume an equal role as one of the child's two parents, she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been).

The additional elements further protect the legal parent against claims by neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends. *Rubano v. DiCenzo, supra* (discussing *V.C. v. M.J.B., supra*); *see also Troxel, supra* (expressing concern about the burden of litigating unreasonable intrusions into the traditional parent-child relationship).

Moreover, inherent in the bond between child and psychological parent is the risk of emotional harm to the child should that relationship be significantly curtailed or terminated. *See C.C.R.S., supra*, 892 P.2d at 258 (disrupting emotional bonds between child and psychological parents "would likely prove devastating to the child and would result in long-term, adverse psychological effects on the child"); *Root v. Allen, supra*, 151 Colo. at 314, 377 P.2d at 119 ("It is unmistakably important that children have a sense of

continuity, or otherwise stated, that they are [able] to avoid the damages which result from serious separations. This need that a child has for continuity, the need to avoid separation, is particularly marked at certain times in life."); *Coulter v. Coulter, supra*, 141 Colo. at 241, 347 P.2d at 494 (quoting *Hochheimer's Custody of Infants* 29: "when the power of the court is invoked to place an infant into the custody of its parents and to withdraw such child from other persons, the court will scrutinize all the circumstances and ascertain 'if a change of custody would be disadvantageous to the infant'"); *In re K.M.B., supra* (recognizing benefits of psychological parent to child); *People in Interest of E.C.*, 47 P.3d 707, 710 (Colo. App. 2002)("In determining a child's best interests in a custody proceeding, the trial court may consider the child's psychological attachment to potential caregivers and the potential harm the child may sustain if the attachment is severed."); *In re Marriage of Martin, supra*, 42 P.3d at 78 (citing Goldstein, *supra*, 11-13, 104, 105; "once this [psychological parent] bond forms, many psychologists believe that breaking up the relationship would be harmful to a child's emotional development").

This deep concern about emotional harm to the child as a result of separation from a psychological parent is echoed by other jurisdictions. *Roth v. Weston, supra*, 789 A.2d at 445 ("when a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship"); *Rideout v. Riendeau, supra*, 761 A.2d at 301 ("The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being. The State, therefore, has an urgent, or compelling, interest in providing a forum for those grandparents having

such a 'sufficient existing relationship' with their grandchildren."); *Youmans v. Ramos*, 429 Mass. 774, 711 N.E.2d 165, 173 n.20, 174 (Mass. 1999)(recognizing a child's vulnerability when the bonds with an adult who acts as a de facto parent are broken; "The damage to the child, who cannot understand what is happening, from breaking these bonds is something which even competent psychiatrists may be unable to predict . . . . Such a breach should not be permitted lightly at the request of [a parent] . . . who [herself] created the unfortunate situation."); *V.C. v. M.J.B., supra*, 748 A.2d at 552 ("the ending of the relationship between the legal parent and the third party does not end the bond that the legal parent fostered and that actually developed between the child and the psychological parent").

In sum, narrower definitions of "psychological parent" are useful to restrict the class of nonparents who may seek parental rights. However, even under a broader definition, such as the division adopted in *In re Marriage of Martin, supra*, denial or significant limitation of contact with a psychological parent creates an inherent risk of harm to a young child's emotional well-being. *See Root v. Allen, supra*.

Accordingly, and without precisely defining all attributes of a psychological parent, we further conclude that emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term.

D. Trial Court Findings and Record

Here, because Clark is exercising a constitutional parental right and, under present law, McLeod is not, they do not stand before us on equal footing. Hence, to interfere with Clark's constitutional right to parent E.L.M.C., as embodied in her parenting plan, we must determine whether the findings show a compelling state interest. We conclude the requisite showing has been made.

The trial court applied the best interests standard and incorporated all relevant factors, consistent with § 14-10-124(1.5)(a) and (b). In doing so, the trial court specifically followed *Troxel* by according weight to the presumption that Clark, as a fit parent, was acting in E.L.M.C.'s best interests.

However, the court further found, with record support, clear and convincing evidence of "special factors," that Clark participated in creating: Clark, by filing for joint custody, requested coparenting responsibilities with McLeod; Clark petitioned to change the child's name to reflect the importance of McLeod in E.L.M.C.'s life; Clark entered into a plan for joint parenting of E.L.M.C. with McLeod; Clark permitted McLeod jointly to parent E.L.M.C. and actively encouraged McLeod's participating in raising E.L.M.C.; E.L.M.C. equally recognizes both parties as her parents; and under the parties' initial joint parenting arrangement and the later temporary order of equal parental responsibility, E.L.M.C. was doing extremely well both academically and socially.

The trial court did not specifically find either that McLeod was a "psychological parent" or that termination of the relationship would "harm" E.L.M.C. Nevertheless, we discern no need for further findings on either issue. *Cf. Borer v. Lewis*, 91 P.3d 375 (Colo. 2004)(upholding lower court's

order setting aside default judgment based on incorrect preponderance of the evidence standard because record supported order under correct clear and convincing evidence standard).

Based on the trial court's findings, which enjoy ample record support, McLeod meets even the most stringent definition of a psychological parent: Clark consented to and fostered McLeod's parent-like relationship with E.L.M.C.; McLeod and E.L.M.C. lived together in the same household for seven and one-half years; McLeod assumed the obligations of parenthood by taking significant responsibility for E.L.M.C.'s development, including contributing towards her support, without expectation of financial compensation; and McLeod established a parental role sufficient to create with E.L.M.C. a bonded, dependent relationship parental in nature, whereby E.L.M.C. recognizes McLeod as her mother. *See V.C. v. M.J.B., supra.*

Thus, the trial court's order granting McLeod's equal parental responsibilities is far more than a judge's mere "better decision" as to the child's best interests. *Troxel, supra*, 530 U.S. at 73, 120 S. Ct. at 2064. Here, given the duration and continuity of McLeod's relationship with E.L.M.C. and her age, proof of the close and substantial relationship between McLeod and E.L.M.C. and proof of threatened emotional harm to the child should parental responsibilities be denied to McLeod are, in effect, two sides of the same coin. *See Roth v. Weston, supra.*

Accordingly, we conclude that, in light of the overwhelming evidence showing McLeod had become a psychological parent, whom E.L.M.C. recognized almost from birth, the curtailment and later termination of McLeod's parental responsibilities in Clark's proposed parenting plan

threatened emotional harm to E.L.M.C., which was forestalled by temporary orders granting equal parental responsibilities. Further, we conclude that for purposes of permanent orders this threatened harm both rebutted the *Troxel* presumption in favor of Clark and constituted a compelling state interest justifying court modification of her parenting plan. *See C.C.R.S., supra* (noting that a custodial dispute should be resolved in the least damaging manner to the child).

We reject Clark's suggestion that, if we affirm the trial court's holding, any adult who has "bonded" with a child -- whether a nanny or other caregiver -- may obtain parental responsibilities. Along with other courts, we recognize the vast difference between the relationship of a child and a psychological parent, as McLeod is to E.L.M.C., and that of a child and a nanny. "Summarily removing a child from her [psychological] parent . . . is different in kind from terminating the employment of a nanny." *Youmans v. Ramos, supra*, 711 N.E.2d at 171. A critical component of that difference is the nanny's expectation of compensation. *See, e.g., Rubano v. DiCenzo, supra*.

Accordingly, we do no violence to Clark's constitutional rights when we uphold the joint parental responsibilities order.

V. Religious Upbringing

Finally, Clark contends the trial court violated the United States and Colorado Constitutions in ordering that, although Clark would be "awarded sole parental responsibility . . . in the area of religion," she would be required to "make sure that there is nothing in the religious upbringing or teaching

that the minor child is exposed to that can be considered homophobic." The court neither defined "homophobic" nor found that exposure to homophobic teachings would either endanger E.L.M.C.'s physical health or significantly impair her emotional development. We conclude that remand for further findings is necessary on both constitutional and statutory grounds.

The First Amendment to the United States Constitution, applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment, and article II, § 4 of the Colorado Constitution guarantee the free exercise of religion. *In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985). These provisions are subject to similar analysis. *See Young Life v. Div. of Employment & Training*, 650 P.2d 515 (Colo. 1982).

While "[c]ourts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing [their] custody decisions solely on religious considerations," the family "is not beyond regulation in the public interest as against a claim of religious liberty, and neither the rights of religion nor rights of parenthood are beyond limitation." *In re Marriage of Short, supra*, 698 P.2d at 1312-13. Thus, "evidence of beliefs or practices which are reasonably likely to cause present or future harm to the child is admissible in a custody proceeding." *In re Marriage of Short, supra*, 698 P.2d at 1313.

When parental responsibilities have been determined, § 14-10-130(1) allows the person with decision-making responsibility to determine "the child's upbringing, including his or her . . . religious training, unless the court, after hearing and upon motion by the other party, finds that, in the absence of a specific limitation of the person's . . . decision-

making authority, the child's physical health would be endangered or the child's emotional development significantly impaired" (emphasis added).

In *In re Marriage of Oswald*, 847 P.2d 251 (Colo. App. 1993), the trial court granted the children's grandmother visitation and allowed her to take the children to her church each Sunday, over objection of their mother, who had custody. Citing § 14-10-130(1) and the absence of any "suggestion whatsoever that the children's mental or physical health was at risk," a division of this court held that the trial court had "improperly interfered with mother's right to determine her children's religious training." *In re Marriage of Oswald, supra*, 847 P.2d at 253; *see also In re Marriage of Jaeger*, 883 P.2d 577 (Colo. App. 1994)(rejecting noncustodial father's First Amendment challenge to trial court order granting mother's request that child receive counseling from a mental health professional who was not a member of father's faith).

Courts in other states, which have not addressed the issue by statute, similarly recognize that harm to the child must be shown before a custodial parent's constitutional right to determine the child's religious upbringing can be restricted in resolving a custody dispute. *See generally* Annotation, *Religion as Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th 971 (1983); *see also* George L. Blum, Annotation, *Religion as Factor in Visitation Cases*, 95 A.L.R.5th 533 (2002).

For example, in *Kendall v. Kendall*, 426 Mass. 238, 687 N.E.2d 1228 (1997), a mother, who had adopted Orthodox Judaism, sought to limit exposure of the children to the father's fundamentalist Christian faith, although the father enjoyed joint custody. The court considered "[t]he

determinative issue [to be] whether the harm found to exist in this case [is] so substantial so as to warrant a limitation on the [father's] religious freedom." *Kendall, supra*, 687 N.W.2d at 1232. The court noted that the requisite substantial harm had been demonstrated in very few cases.

The *Kendall* court upheld a general restriction against indoctrinating the children "in a manner which substantially promotes their . . . alienation from either parent or their rejection of either parent," and a specific prohibition against the father's sharing his religious beliefs -- that persons "who do not accept Jesus Christ . . . are destined to burn in hell" – with the children "if those beliefs cause the children significant emotional distress or worry about their mother or about themselves." *Kendall, supra*, 687 N.E.2d at 1231. The court explained that the restriction "was intended for a wholly secular purpose -- to limit the emotional harm to the children caused by exposure to negative messages presented by the [father's] religion." *Kendall, supra*, 687 N.E.2d at 1236; *see also MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996)(despite joint custody, order giving father sole control over child's religious training upheld because, since mother introduced child to activities at her church, child had experienced stress and anxiety from exposure to conflicting religions), *overruled in part by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

Courts have applied a similar analysis in limiting a custodial parent's involvement of the child in door-to-door religious solicitation. *Compare Morris v. Morris*, 271 Pa. Super. 19, 34, 412 A.2d 139, 146 (1979)(restricting parent's involvement of child in door-to-door religious solicitation that "would probably, although not necessarily, result in some psychological impairment"), *with Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996)(rejecting limitation on

door-to-door solicitation that posed no immediate and substantial threat to the child's mental or physical health).

Here, the trial court observed that Clark and McLeod "will never be able to agree regarding the religious upbringing of the minor child" and awarded Clark "sole parental responsibility" concerning religion. Thus, Clark is "the person . . . with responsibility for decision-making" within the meaning of § 14-10-130(1).

We note that *Random House Webster's Unabridged Dictionary* 916 (2d ed. 1998), defines "homophobia" as the "unreasoning fear of or antipathy toward homosexuals and homosexuality." Another dictionary defines "homophobia" as "irrational hatred or fear of homosexuals or homosexuality." *Webster's New World College Dictionary* 684 (4th ed. 1999).

The parties present no authority describing homophobia in terms of religious doctrine. Nevertheless, we must address the trial court's pairing of its restriction on homophobic teachings with E.L.M.C.'s religious upbringing because courts have no jurisdiction over "quintessentially religious controversies." *Van Osdol v. Vogt*, 908 P.2d 1122, 1132 (Colo. 1996)(quoting *Serbian E. Orthodox Diocese v. Milijevich*, 426 U.S. 696, 720, 96 S. Ct. 2372, 2385, 49 L. Ed. 2d 151 (1976)).

We review the legal standard applied by a trial court de novo. *People in Interest of J.R.T., supra*. Here, however, we cannot determine from the findings whether the trial court applied the correct standard in limiting Clark's right to determine the child's religious upbringing. *See In re Marriage of Jensen-Branch*, 78 Wash. App. 482, 899 P.2d 803 (1995)(while evidence may have shown actual or potential

harm to children from parental conflict over religious upbringing, remand was required to resolve whether trial court had considered constitutional issues and lesser restrictions on rights of custodial parent).

Although McLeod argues this restriction is a mere nondisparagement clause, we cannot uphold it on this basis because it is not so described in the trial court's order. Nor is it mutual.

Hence, given the important role that religious freedom enjoys in our constitutional scheme of ordered liberty, *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986), and the mandate of § 14-10-130(1), we conclude that remand is necessary.

Considering the passage of time since the permanent orders hearing, the trial court may choose to hold a new hearing focused on "the current status of the parties . . . in light of the standards announced in this opinion." *In re Marriage of Short, supra*, 698 P.2d at 1313. The court also may conclude that the existing record is sufficient to make further findings regarding the religious upbringing restriction.

Clark does not assert, and we do not address, amicus Liberty Counsel's argument that lack of a definition of "homophobic" in the order creates a constitutional problem of vagueness and overbreadth. However, Clark may present this issue to the trial court on remand, in the context of the court's additional findings.

The order is affirmed as to joint parental responsibilities and parenting time. The order is vacated as to limitations on religious upbringing, and the case is remanded to the trial

court for further proceedings, consistent with this opinion, under § 14-10-130(1).

JUDGE NIETO and JUDGE RUSSEL concur.

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

Case Number 96 DR 39
Courtroom 6

[Filed March 29, 2004]

Petitioner	)
CHERYL ANN CLARK	)
	)
Respondent:	)
ELSEY MAXWELL McLEOD	)
	)

ORDER

THIS MATTER comes before the court in an unusual posture. An oral request has been made to the court transcriber, Kathy Trostel, for a transcript of the proceedings in the above-captioned case. The case is presently on appeal before the Colorado Court of Appeals. The transcript is sought apparently by the office of the Colorado Legislative Council. Judge Coughlin presided over the hearings and entered orders in the above-captioned case. Because a resolution has been introduced in the Colorado House of Representatives seeking the impeachment of Judge Coughlin for actions taken in this case, Judge Coughlin has recused himself and this court has addressed the request made by the Legislative Council.

The Court initially notes that once a case is taken on appeal the trial court loses jurisdiction over almost all matters in that case. One part of a case which remains within the jurisdiction of the trial court is any matter which is collateral to the issue on appeal. The court concludes that the issue on appeal relates to the legal propriety of the rulings made by Judge Coughlin and does not relate to the contents of the transcripts. The court therefore concludes that the issue before this court is collateral to the issue on appeal and this court retains jurisdiction to rule on it.

From the limited record which remains in the trial court it appears that prior to Judge Coughlin taking any action on the case a motion that the case be sealed from public view was granted by Magistrate Dupree. It is this court's understanding that that motion was granted based upon a finding that the privacy interest of one or both of the parties and the privacy interest of the minor child in this case outweighed any public interest in the case.

The court finds that the introduction of the house resolution seeking the impeachment of Judge Coughlin relating to issues in this case changes the public interest in this case. The public interest now outweighs the privacy interest of the parties. Accordingly, the court orders the transcript unsealed and orders that it may be made public.

The court finds, however, that the privacy interest of the minor child is not outweighed by the public interest.

Based upon the above findings the court orders that the entity seeking the transcripts shall be granted a copy of the transcripts under the following conditions:

1. The person requesting the transcript shall pick up the transcript in person.

2. That the copies be provided to the requesting agency after the name of the minor child is redacted from each and every location in the transcripts in which it may be found.

3. If the person picking up the transcript is a state employee and the transcript is for a state governmental unit, the transcript will be provided without cost.

The court is advised that the court transcribers produced an extra copy of the transcript. The court will ask the court's lead transcriber, Kathy Trostel, to perform the redactions which have been ordered by this court.

Done this 29 day of March, 2004.

BY THE COURT:

/s/ _____
H. Jeffrey Bayless
District Judge

CC: James Rouse
Gina Weitzenkorn
Chief Judge Janice Davidson, Colorado Court of Appeals
Honorable John Coughlin
Kathy Trostel
Gerry Maroney, State Court Administrator